THE DIRECTOR OF CENTRAL INTELLIGENCE

Deputy Director for National Foreign Assessment

14 October 1981

NOTE FOR: Chairman, National Intelligence Council

SUBJECT: IG Meeting on Modifications of Law Applicable to International Nuclear Functions

The State-prepared paper for the subject meeting is forwarded, FYI, as a followup to the discussion at this morning's NIC meeting. I will be at the IG meeting.

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cc: SA/NPI

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State Dept. review completed

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DEPARTMENT OF STATE

Washington, D.C. 20520

October 2, 1981

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MEMORANDUM

TO: IG Members of the IG on U.S. Non-Proliferation and Peaceful Nuclear Cooperation Policy

FROM: OES - James L. Malone

SUBJECT: Discussion Paper on Modifications of Law Applicable to International Nuclear Functions

As promised at the IG meeting of August 4, the Department of State has prepared a paper on key issues relating to amending the law applicable to international nuclear functions.

This paper is intended to serve as the basis for a discussion in an IG meeting that will be held on Monday, October 19 at 3:00 PM in room 7835 of the Department of State.

Our intention is to hold preliminary and informal Congressional consultations on this matter after we have had the IG discussion, and then to prepare a draft Presidential decision memorandum on the subject, which will be circulated for inter-agency review.

Attachment

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DISCUSSION PAPER - MODIFICATIONS
OF LAW APPLICABLE TO INTERNATIONAL NUCLEAR FUNCTIONS

The attached paper, previously circulated to the IG, discusses elements of a proposed reorganization plan* and bill dealing with international nuclear functions. Many of the proposals are not likely to cause any major difficulties on the Hill, but some may be controversial. This paper discusses the three proposals that are likely to be most controversial: the transfer of the nuclear export licensing function from the Nuclear Regulatory Commission to the Department of State, the elimination of the retroactive application of the nuclear export criteria established by the Nuclear Non-Proliferation Act of 1978, and the elimination of certain sanctions found in that Act and in the Foreign Assistance Act of 1961. In addition, the possible transfer of Department of Energy international nuclear export regulatory functions to the Department of State is also discussed.

Each of these proposals requires Congressional acceptance. As important as it may be to take these steps, rejection by the Congress may also have adverse consequences in terms of foreign perceptions of the reliability of the U.S. as a nuclear supplier. This factor must be borne in mind in determining how to proceed.

Nuclear Export Licensing

Under current law, the NRC issues export licenses for the export of nuclear materials and equipment to foreign countries. It may do so only after receiving a judgment from the State Department, on behalf of the Executive branch, that a proposed export is not "inimical to the common defense and security" and a review by the Department of whether the export meets certain criteria established in law. If the Executive branch recommends in favor of a license, but the NRC does not grant it, the President may authorize the export by Executive Order, subject to Congressional veto by concurrent resolution.

* Legislation to provide Presidential reorganization authority is currently pending in the Congress. If the legislation is not enacted, the changes discussed in this paper as reorganization plan proposals will be transformed into bill provisions.

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The proposal is to transfer the NRC's export licensing functions to the Department of State by reorganization plan. The NRC would no longer be involed in nuclear export matters. State would continue to consult the Executive branch agencies specified in current law (DOE, ACDA, DOD and Commerce), on export license application. Under the proposal, if an export license application did not meet the statutory criteria for approval but State believed that withholding the export would be seriously prejudicial to the achievement of U.S. non-proliferation objectives or would otherwise jeopardize the common defense and security, it could refer the case to the President, who could authorize the export by Executive Order, subject to Congressional veto by concurrent resolution.

Advantages. Removing the export licensing function from the NRC, an "independent" agency not subject to the direction of the President, would significantly restore other nations' confidence that undertakings of the Executive branch will be fulfilled in a timely and predictable matter, and our image as a reliable nuclear supplier generally. This, in turn, would improve our influence and ability to achieve our non-proliferation objectives, since our image as an unreliable supplier has stimulated others to turn to other countries or go their own ways. Moreover, it is undesirable, in principle, for an independent regulatory commission to exercise a check on Executive branch determinations in this sensitive area of foreign and national security policy. The NRC does not have the inherent expertise in foreign affairs or responsibility for the overall effects its decisions might have on our relations with other nations. While the law allows the President to override the NRC when it does not accept a positive recommendation from the Executive branch, the President's authority in ths vital area is delayed and to some extent confused by placing responsibility for nuclear export licensing decisions outside the Executive branch. This situation has a particularly discriptive impact on intergovernmental nuclear coopertion negotiations because the U.S. negotiators cannot with certainty represent any more than the Executive branch position. The nuclear export licenisng decision is made by the NRC. Since the NRC applies the same standards and licensing criteria that the Executive is by statute obligated also to consider, the NRC sequential review is a redundant and time-wasting review of the same data, intelligence and foreign policy judgments that have already been considered by the Executive branch. Finally, the Kemeny Commission, the Rogovin Report, and a majority of the Commissioners themselves have favored transferring the export licensing function to the Executive branch, in order to enhance the Commission's ability to deal with domestic health and safety matters.

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Disadvantages. There will be some strong Congressional opposition, and a major effort by the Administration will be required to succeed. Some key members of Congress feel strongly that the NRC provides a necessary independent check of Executive branch determinations on whether the non-proliferation criteria for nuclear export licensing decisions are met, and a necessary counterweight to incentives for the Executive branch to promote nuclear exports (e.g., balance of payments concerns, desire for closer relations with recipient nations, etc.) or to trade non-proliferation criteria for other political or foreign policy objectives. (Particularly strong opposition can be anticipated from Senators Glenn and Cranston and Congressmen Bingham and Zablocki. In addition, NRC Commissioner Gilinsky is likely to testify against such a transfer.) Further, this may be seen by some as a watering down of U.S. nuclear export and non-proliferation policy, and an attempt to reduce Congressional oversight of controversial cases where the NRC and Executive branch disagree. It may also be argued that the need for NRC review has provided the Executive branch significant leverage in negotiating non-proliferation matters with other countries.

DOE Nuclear Export Regulatory Functions

Under current law, the Department of Energy is responsible for authorizing unclassified nuclear technology exports. The export of reactor technology is generally authorized to most non-COCOM controlled countries, but the Secretary of Energy must personally approve exports of this technology to other countries and exports of sensitive nuclear technology to any country upon a finding that they are not inimical to U.S. interests, after obtaining State Department concurrence and consulting ACDA, DOD and Commerce. Under current law, the Department of Energy also is responsible for approval of subsequent arrangements, such as retransfer or reprocessing approvals under agreements for cooperation or the entry into enrichment contracts with foreign entities. The Department of State has a concurring role and the lead in policy negotiations concerning subsequent arrangements; ACDA, DOD, NRC and Commerce must also be consulted. A Federal Register notice must be published stating that the arrangement is not inimical to U.S. common defense and security, and, in the case of arrangements involving reprocessing, retransfers for reprocessing, or transfers of significant amounts of recovered plutonium, an additional finding concerning the risk of proliferation must be made and the arrangement must be notified to Congress in advance.

On September 24, 1981, President Reagan proposed that the Department of Energy be abolished. The Administration is preparing a legislative proposal to reallocate DOE's functions. That proposal or the reorganization plan could transfer the foregoing functions from the Department of Energy to the Department of State. Whether to retain the requirement that the two agencies concur in these matters, as well as whether to retain the current DOE concurrence or consultative role in a large number of other international nuclear matters, will depend on the nature of the agency or agencies to which the Administration proposes to transfer DOE's nuclear responsibilities.

Advantages. If the export licensing function is transferred to the Department of State, there would be a strong argument for also transferring the DOE functions so that all nuclear export regulatory functions are consolidated in a single agency. In any event, the transfer of these functions would contribute to improving foreign perceptions of the predictability of the U.S. nuclear export process and facilitate the application of uniform non-proliferation policy standards to all U.S. nuclear export activities. The transfer would permit the Secretary of State more effectively to manage U.S. non-proliferation, national security and foreign policy, integrating the relevant considerations and utilizing all available U.S. influence as called for in the President's July 16, 1981, policy statement. The transfer would significantly facilite development of new longer term programmatic and generic arrangements with cooperating countries. The transfer would also eliminate the uncertainties abroad created by the Department of State having the lead negotiating role in many of these cases, but the Department of Energy or another successor agency being responsible for implementation. The transfer would help avoid duplicative staffing and analysis, as the Department of State staff must currently already analyze the policy and legal issues and concur in the required legal findings, but would permit State to continue to draw on government technical expertise as necessary. Finally, since all DOE functions are due to be transferred in in any event in view of the Administration's proposal to abolish DOE, transfer of the nuclear export regulatory functions to State would not cause additional disruption and would be the most reasonable step from the point of view of management efficiency and effective policy implementation.

Disadvantages. It may be argued that the Department of Energy (or a successor agency) has the technical experties to perform these functions, and that the current allocation constitutes a rational division of work. Any Executive branch agency is responsive to Administration non-proliferation, security and foreign policy, and the current Department of

State concurring roles provides a check here. There is no reason to think that a transfer to State instead of a different successor agency will improve the foreign perceptions of predictability of U.S. nuclear export activities. Rather, it might be seen as shifting the responsibility away from an agency having the best technical capability to handle it. In the specific area of enrichment contracting, it is particularly sensible to leave the subsequent arrangement lead with the agency that owns the U.S. enrichment facilities and is the point of contact on enrichment contract matters. (However, a transfer of functions could be fine-tuned to exclude this latter element.)

Elimination of Retroactivity

While current law contains a proviso that the new requirements for new or amended peaceful nuclear cooperation agreements do not affect the validity of existing agreements, exports under existing agreements are made subject to the new export licensing criteria established by the NNPA. Congress intended, and we have considered, that existing agreements meet the export criteria that became applicable immediately upon enactment of the NNPA; while the NRC has raised questions in this regard occasionally, this has never been the sole cause of a license denial. However, the delayed effect of de facto full-scope safeguards export criterion is holding up exports to India, South Africa, Brazil and Argentina, all of which have existing agreements for cooperation with the U.S. Such retroactive application of export requirements has been widely criticized by other nations and in INFCE.

The proposed change would stipulate that none of the export criteria established by the Nuclear Non-Proliferation Act would prevent exports under agreements for cooperation in force on the date of enactment of the NNPA. The proposed change would not alter the pre-existing requirement for a finding that the export will not be inimical to U.S. common defense and security.

Advantages. Although few countries have actually been affected by U.S. retroactive application of the nuclear cooperation conditions established by the NNPA, as noted above, countries have viewed these conditions as demonstrating a U.S. tendency to act unilaterally, and this has had a significant adverse effect on the U.S. image as a reliable nuclear supplier. Revising our laws to eliminate any retroactivity could signal a major change in attitude to foreign countries.

Disadvantages. Since this change could be taken as a major signal to others about our non-proliferation attitude, many in the Congress and elsewhere will see it as a weakening of U.S.

non-proliferation policy and resolve. Opponents will quickly point out that this proposal undermines the key compromise in the Nuclear Non-Proliferation Act of 1978 -- that after a certain grace period, the de facto full-scope safeguards requirement will become an absolute export condition for U.S. nuclear cooperation with foreign nations. Under the proposal, the United States would be able to continue nuclear cooperation with Brazil, Argentina, South Africa, and India, regardless of whether the full-scope safeguards export requirement set forth in law is met. (These countries would only be compelled to meet that requirement when their preexisting agreements expired and the negotiation of a new cooperation agreement became necessary.) Thus the discussion of this proposal would most likely be focussed on the desirability and nature of U.S. nuclear cooperation with these particular countries -- especially India and South Africa -- rather than important role that the proposal would have in reestablishing the United States as a reliable nuclear supplier. Moreover, they will argue that the President already has authority under current law to waive the full-scope export requirement, subject to Congresional disapproval by concurrent resolution within 60 days of continuous session. A major effort will be required by the Administration to succeed on the Hill.

The Elimination of Certain Sanctions

The NNPA amended the law to require termination of nuclear exports to any non-nuclear-weapon state found by the President to be engaging in a weapons development program involving source or special nuclear material, and to any state so found to be assisting such a program. Atomic Energy Act, §§129(1)(D), (2)(B). It also requires termination of nuclear exports to any state so found to have entered into an agreement after March 10, 1978, for the transfer of reprocessing equipment, materials or technology to a non-nuclear weapon state except pursuant to an international agreement or understanding to which the U.S. subscribes. Atomic Energy Act, §129(2)(C). Provisions were added to the Foreign Assistance Act in 1976 and 1977 requiring termination of certain economic and military assistance to any nation that transfers or receives reprocessing or enrichment equipment, material or technology. (The enrichment provision does not apply if before the transfer the recipient has agreed to place the facility in question under multilateral auspices and has accepted full-scope safeguards.) Foreign Assistance Act of 1961, §§669, 670 (the "Symington" and "Glenn" Amendments). Each of these provisions contains a Presidential waiver, but some are difficult to use and are subject to Congressional review. The proposal is to eliminate the sanctions provisions described above.

Advantages. While the threat or use of sanctions by the Executive branch may sometimes be an effective tool, such action must be carefuly decided on in the light of all the circumstances of each particular case. These particular sanctions provisions are inflexibly mandated by law. Moreover, they are ambiguous and deciding whether they are applicable has raised numerous problems of interpretation and resulted in delayed exports on occasion. They have not been the most effective method of dealing with proliferation problems. In key cases, the sanctions provisions have hindered the Administration from dealing with national security concerns that underly the non-proliferation problems, or dealing effectively and cooperatively with allies in order to meet a proliferation problem in a third country. The sanctions have been a major irritant both to our allies and to recipient nations. Those involving transactions among other countries have appeared to our allies to constitute United States intermeddling in transactions to which the United States is not a party. We are more likely to persuade our allies to cooperate with us in dealing with nations of true non-proliferation concern by seeking their cooperation and working with them, rather than by threatening to cut off our allies because of transactions of firms subject to their jurisdiction with third countries. Moreover, some of the firms involved are not reputable and consequently hard to control.

Disadvantages. Elimination of these sanctions provisions, particularly those triggered by weapons development activity, will be seen by many in the Congress and elsewhere as a major weakening of U.S. non-proliferation policy and resolve. It may be argued that these provisions have provided the U.S. leverage in stemming the flow of sensitive transfers to Pakistan. Moreover, foreign countries of proliferation concern may misread this change to be a signal that the U.S. no longer will be concerned about nuclear weapons development. In the Congress, such sanction provisions are considered by many to constitute the only effective way to control Executive branch action in response to key events of proliferation concern. Thus, opponents on the Hill will also argue that the elimination of these sanctions will eliminate the critical role Congress now plays in oversight of non-proliferation policy in these areas. They will point to the Presidential waiver provisions in each of these sanctions sections and argue that if application of the provision unduly restricts Administration options to deal with national security or non-proliferation threats, the waiver provision should be used -- which would trigger Congressional review provisions. Seeking this on the Hill will reinforce certain Congressional fears about the Administration's non-proliferation resolve and might result in tighter legislation restricting our actions and further diminishing our flexibility. A major effort will be required by the Administration to succeed on the Hill.

INTERNATIONAL NUCLEAR FUNCTIONS

The Administration may decide to send to the Congress a complementary reorganization plan and bill designed to streamline the U.S. nuclear export process, eliminate duplicative reviews and reestablish the United States as a reliable nuclear trading partner. The main features of these proposals are set forth below.

Reorganization Plan

- Export Licensing. The Plan will transfer the nuclear export licensing function from the Nuclear Regulatory Commission to the Secretary of State.

In exercising this function, the Secretary will be bound by the applicable statutory criteria. If he believes that these criteria are not met but that withholding a proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives or would otherwise jeopardize the common defense and security, he may refer the export to the President. If a proposed export is referred to the President, he may authorize it by Executive Order under the existing statutory standards and procedures.

• Technology Exports. The Plan could transfer the function of authorizing unclassified technology exports (under section 57 b.(2) of the Atomic Energy Act, which is currently implemented by 10 CFR Part 810) from the Secretary of Energy to the Secretary of State.

• Subsequent Arrangements (such as retransfer or reprocessing approvals under cooperation agreements). The Plan could transfer the function of approving such arrangements from the Secretary of Energy to the Secretary of State. (Currently, the Secretary of State already has a concurring role and the leading role in policy negotiations, but the Secretary of Energy has approval responsibility.)

• Procedural Modifications.

-- Requirements for consultation with the Nuclear Regulatory Commission on nuclear export activities or international nuclear cooperation will be abolished.

-- Nuclear Regulatory Commission authority to cooperate with foreign nations on nuclear safety and domestic regulatory and safeguards matters will not be affected.

-- The Secretary of State will have the sole responsibility for submitting a negotiated agreement for cooperation to the President for approval.

-- Reporting to Congress will be consolidated into one annual Presidential report.

Bill

• Retroactivity. The Bill will eliminate retroactivity by providing that specific export criteria in the Atomic Energy Act shall not affect cooperation under agreements the United States had with foreign nations prior to 1978.

• Export Procedures. The Bill will create a presumption that exports will continue once the findings required by law have been made, unless there is a finding that there are material changed circumstances.

The Bill will clarify that, if a determination is made that a category of exports lacks significance for nuclear explosive purposes, no further findings to issue an export license will be necessary.

• EURATOM. The Bill will eliminate the need for an annual Presidential waiver in order for the U.S. to continue nuclear cooperation with EURATOM under existing nuclear cooperation agreements and the ceilings under U.S. law on the export of low enriched uranium to EURATOM under those agreements.

• Elimination of Duplicative Reviews. The Bill will eliminate duplicative reviews of the same export transaction. If an export is licensed by an Executive Branch agency or reviewed under the subsequent arrangement procedures, it will not be necessary also to review the same transaction under the provisions dealing with unclassified technology exports (section 57 b. of the Atomic Energy Act). Further, if a transaction is approved as part of an export license by an

agency of the Executive Branch, it will not be necessary to review the same transaction under the subsequent arrangement procedure. Finally, if enrichment of source or special nuclear material after export is approved in an export license, a separate approval of enrichment after export (under section 402 (a) of the Nuclear Non-Proliferation Act) will no longer be required.

• Exports under New Agreements for Cooperation. The Bill will provide that for any export under a new or amended agreement for cooperation that entered into force after March 10, 1978, no finding will be necessary that the specific export criteria in sections 127 and 128 of the Atomic Energy Act are met.

The Bill makes the preparation of a Nuclear Proliferation Assessment Statement for new or amended agreements for cooperation optional; such a statement would only be prepared when the ACDA Director determined that the proposed agreement might significantly contribute to proliferation (this is the same standard that governs the preparation of such statements for subsequent arrangements).

• Sanctions. Certain sanction provisions have not been effective in dealing with proliferation problems and have been an irritant to recipient nations. The Bill will eliminate the sanctions of terminating nuclear exports for engaging or assisting in activities having direct significance for nuclear explosives and for entering into agreements for any reprocessing

transfers (subsections 129(1)(D), (2)(B), and (2)(C) of the Atomic Energy Act). The Bill will also eliminate the sanction of terminating certain economic and military assistance in the case of third country transfers of reprocessing or enrichment equipment, material or technology, contained in the Symington and Glenn amendments (sections 669 and 670 of the Foreign Assistance Act of 1981).

• Component Exports. The export controls that apply to component exports are more stringent if components are exported under cooperation agreements than if they are exported outside the scope of such an agreement. This is anomalous since there is no requirement under law that components be exported under an agreement for cooperation. The Bill will conform the export conditions that apply to component exports under agreements to those that apply to exports outside of agreements.